85-1283

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

MARY HAYSSEN, ALLAN B. GOLDSMITH, JEANIE A. GOLDSMITH, HARVEY ZOET, BARBARA LARSON, ROBERT L. LARSON, and EDWARD HARTNETT,

Petitioners,

vs.

BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA,

Respondent.

LOREN M. BERRY,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal,
State of California,
First Appellate District

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QUESTIONS PRESENTED

1. If an individual's address is identified, may his fundamental property rights be adjudicated without notice by mail or its equivalent to him?
2. Does the possibility of post-adjudication review relax the personal notice standard?

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First Appellant District

Petitioners, Mary Hayssen, Jeanie and Allan Goldsmith, Harvey Zoet, Barbara and Robert Larson and Edward Hartnett, pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of

California in and for the First Appellate District (1 Civil A020841) entered in this matter on August 22, 1985.

OPINION BELOW

The opinicn of the Court of Appeal of the State of California, First Appellate District and the order of the Supreme Court of California on October 30, 1985, denying a petition for review, are reproduced in the appendix.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §§1257 and 2101, this being a petition arising out of a right claimed under the Constitution of the United States. The petition is filed within 90 days of October 30, 1985.

CONSTITUTIONAL PROVISION AT ISSUE

AMENDMENT XIV:

> ". . . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law."

STATEMENT OF THE CASE

The facts we state are undisputed in the record unless otherwise indicated.[1]

Petitioners Mary Hayssen, Jeanie and Allan Goldsmith, Harvey Zoet, Barbara and Robert Larson and Edward Hartnett are owners of real property in a remote residential area of northern California. Without notice to them, real party in interest, Loren Berry, a neighboring property owner, applied for a conditional

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[1] "R.T." refers to the Reporter's Transcript on Appeal. "450:19-453:16" refers to pages and lines of the transcript. "J.A." refers to the Joint Appendix lodged in the Court of Appeal.

use permit to build a sawmill on a thirty acre site adjacent to their properties. Under existing Sonoma County zoning, a sawmill could not be operated without such a permit.

Respondent Sonoma County Board of Zoning Adjustments ("BZA") set the matter for hearing on January 27, 1977. As owners of the principally affected nearby properties, petitioners were the parties with most at stake in the adjudication.

Ignoring mailing addresses at their disposal (R.T. 367:20-23; 161:21-162:10; 320:22-28), the County made no attempt to reach petitioners by mail or by any other means of notice as certain as notice by mail.

A. The Constructive Notice

The County instead employed notice by publication and posting. Publication

consisted of a one-half inch small print "notice" in the January 11, 1977, edition of the Sonoma County Press-Democrat. Posting consisted of approximately eight (8) notices posted on country roads in the general vicinity of the proposed sawmill site (R.T. 450:19-453:16; 487:11-490:14).

Petitioners Hayssen, Goldsmith, Zoet and Larson had no opportunity whatsoever to see the posters. Petitioner Hayssen, a resident of the house closest to the sawmill site, was in Wisconsin taking care of her father in 1977 (R.T. 367: 16-17; 440:1-4). The Goldsmiths, who hold onto their Sonoma County property for a retirement home, were residing in central California (R.T. 159:23-28). Petitioners Larson, who live at their Sonoma County property during the warmer months, were residing in Southern California (R.T. 322:10-14). Petitioner Zoet was in Holland, Michigan (R.T. 446).

Unlike the other petitioners, petitioner Hartnett was residing on his property when the notices were posted. Nonetheless, no Board of Zoning Adjustments posters were placed on or near his property nor were ever seen by him (J.A. 336). The closest poster was placed at a street intersection more than one thousand feet (1,000') from his house (R.T. 221; 245:19-26; 488:28-489:3).

B. The Misleading Notice

The published and posted notices provided a wrong address for the proposed mill. The notices identified a site approximately two thousand feet (2,000') from the actual building site of the proposed mill (R.T. 215:15-16; 205:13-14). A sawmill located at the site described in the notice would have only a minimal impact upon the noise environment of petitioners' properties.

(R.T. 215:7-20).

C. The Use Permit Hearing

None of the petitioners were aware of or attended the January 27, 1977 hearing (J.A. 366). Based upon Berry's uncontested representations, the BZA found that the operation of a sawmill would not be detrimental to the neighborhood and granted a sawmill use permit (J.A. 11). Condition six of the permit authorizes Berry to impose up to 65 dBA of noise on nearby residential premises (J.A. 12).

D. The Noise Impact

The noise impacts are enormous. Berry is authorized to operate at noise levels which double the ambient noise at the Goldsmith property, quadruple the ambient noise levels on the Larson and Hartnett properties, and increase the ambient noise levels on the Hayssen

property by a factor of thirty (R.T. 161: 14-17; 183:11-20; 195:5-24; 197:20-200: 19; 205:21-22; 206:3-7; 223:8-15; 255-258; 262:17-263:19; 321:13-322:2; 356:19-357:26; 439:15-26; J.A. 529-536).

E. The Trial Court Action

After belatedly learning about the use permit hearing, certain petitioners herein during 1978 and up through January, 1979, sought local administrative relief (R.T. 553:25-554:6). After the County's refusal to grant any relief whatsoever, petitioners filed suit on February 26, 1979, in the Sonoma County Superior Court, requesting injunctive and declaratory relief on the ground that their rights had been adjudicated by the Board of Zoning Adjustments without due process notice to them (J.A. 1).

After extensive pre-trial motions, the matter came to trial in February,

1981. Before hearing all the evidence, the trial court granted respondents' motion for judgment, holding that petitioners were not entitled to better notice (J.A. 241-245).

F. The Offer of Proof re Equitable Facts

Since the trial court only heard evidence relating to the adequacy of the notice, proof going to the equities required for injunctive relief has not yet been allowed (R.T. 28:11-28; 86:27-87:6; 119:21; 156:14-157:5; 176:13-19; 176:21-22; 177:5-17; 269:16-17; 270:14-271:2-6; 441:22-24; 550:18-28; 551:1-8; 552:7-10; 553:23-554:11). There is therefore no complete record as to what occurred between the date of the BZA hearing and petitioners' first (1978) efforts to obtain administrative relief (Id.). A few facts, however, are uncontroverted in the record:

1. None of the petitioners were aware of the use permit hearing until well after the hearing (J.A. 366).

2. Petitioners Goldsmith first learned about the hearing in January, 1979 (R.T. 162:17-21).

3. Petitioner Hartnett first learned about the hearing in early or mid-1978 (R.T. 234:1-2).

4. Peititioners Larson first learned about the use permit in April, 1977. They stated that they took no action in reliance upon Berry's representations that they would not hear the mill (R.T. 331:4-28; 344:15-348:6).

5. It is claimed that petitioner Hayssen may have heard in August, 1977 about "plans to build a sawmill in five to ten years" (R.T.

371:9-372:18; 373:2-12; 399:13-400:2).[2] While she never had an opportunity to testify on this subject, she offered to prove that she first learned about the use permit hearing in 1978, shortly before she sought administrative relief (R.T. 440:14).

6. Petitioners offered to prove that there was no delay on their part and

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[2] The Court of Appeal incorrectly states that "some appellants received actual notice of proposed sawmill construction before and after the January, 1977 hearing." (Opinion at p. 5, Appendix A.) The Court of Appeal also incorrectly suggests that Mary Haussen received this notice from a co-owner residing on the Hayssen property. (Opinion at p. 19, Appendix A.) The only evidence whatsoever on this subject is testimony by witness Bowers, a tenant at will on the Hayssen property, and not a co-owner (R.T. 372). He testified that at some time in 1977 he had heard of plans to build a sawmill "in five to ten years," but had absolutely no knowledge of the January 27, 1977 hearing (R.T. 371:9-372:18; 373:2-12; 399:13-400:2).

that Berry was not prejudiced by any delay (R.T. 551:1-28; 552:2-10).

G. Post-Trial Events

At the time of filing suit, the sawmill had not yet been constructed. Only declaratory and injunctive relief were therefore sought. Berry completed his mill after the trial and now employs his noise easement to the full extent authorized by the use permit.

H. The Court of Appeal Decision

On August 22, 1985, the California Court of Appeal, First Appellate District, Division Three, affirmed the decision of the trial court. The Court of Appeal expressly holds that the rule of Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950), does not require notice by mail or its equivalent in all proceedings which deprive an individual of property rights. The court instead espouses "case

by case determination" and a California "flexible notice requirement" for land use adjudications which "refrain(s) from describing a specific formula which details the nature, content, and timing of the requisite notice." (Opinion at p. 11, Appendix A.) Applying case by case determination, the court holds that posted notice is sufficient if the posters are on highways which adjoining property owners must use to reach major stores or services. The court therefore holds that property owners who were absent during the posting period or who did not see the posters have no entitlements under the Due Process Clause outside of their right to seek discretionary post-adjudicatory administrative relief.

On October 30, 1985, the California Supreme Court voted to deny a petition for review (Appendix B).

REASONS FOR GRANTING THE WRIT

I.
IF AN INDIVIDUAL'S ADDRESS IS KNOWN, HIS FUNDAMENTAL PROPERTY RIGHTS CANNOT BE ADJUDICATED WITHOUT NOTICE BY MAIL OR ITS EQUIVALENT TO HIM.

In case after case this Court has ruled that the state may not adjudicate a person's property rights without due process notice. Throughout these decisions, the Court has held unwaiveringly to the principle that notice by mail or its equivalent is a constitutional minimum for parties whose identity and location are reasonably ascertainable.

A. Mullane and its Progeny

In the seminal decision of Mullane v. Central Hanover Tr. Co., 339 U.S. 306, this court held that published notice of an action to settle the accounts of a common trust fund was not sufficient to inform beneficiaries whose names and

addresses were known. The Court required due process notice since "the proceeding is one in which [the beneficiaries] may be deprived of property rights." (Id., at p. 313.) Under such circumstances only notice by mail or its effective equivalent may be employed:

> "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen mentod may be defended on the ground that it is in itself reasonably certain to inform those affected. . .
>
> Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.
> (Mullane v. Central Hanover Tr. Co., supra, at 315, 318.)

In Schroeder v. New York, 371 U.S. 208 (1962), this Court held that the

Mullane "personal notice" requirement extended to statutory compensation rights arising out of the diversion of the Neversink River twenty-five miles upstream from Schroeder's property. Notice was provided by publication in local newspapers and twenty-two notices along a seven or eight mile stretch along the side of the river in the general vicinity of plaintiff's property. These notices were posted during one of the winter months when Schroeder was away from the house. Unaware of why the Neversink River sank, Schroeder did not file a claim for damages to her property until 1960, five years after the statute of limitations had allegedly run. The court held that the statute of limitations did not apply since the publication and posting did not satisfy the personal notice requirement:

"Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. . . .

* * *

"It is true that in addition to publishing in newspapers, the city in the present case did put some signs on trees and poles along the banks of the river. But no such sign was placed anywhere on appellant's property, or ever seen by her. The posting of these signs, therefore, did not constitute the personal notice that the rule enunciated in the Mullane case requires." (Schroeder v. New York, supra, at 213.)

In Greene v. Lindsey, 456 U.S. 444 (1982), this Court again rejected the use of posted notice when important property rights were at stake. A Kentucky statute provided that in forcible entry and detainer actions, service of process may be made by posting a summons on the door of a tenant's apartment. In arriving at a constitutional assessment of this

procedure, the Court noted that posters are sometimes torn down. Thus, "[i]n a significant number of instances, reliance upon posting . . . results in a failure to provide actual notice." Id. at 453. The Court therefore held that notice by posting on an apartment door is "an unreliable notice procedure . . . not reasonably calculated to reach those who could easily be informed by other means at hand." Id. at 455-456. Notice by mail, held the Court, should have been employed. Id. at 455.

In Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), a mortgagee challenged a tax sale of which he had no actual notice where constructive notice was provided by publication and posting in the county courthouse. This Court held that the Mullane personal notice requirement applied to the mortgagee's legally protected interests:

> "Since a mortgagee clearly has a legally protected interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. C.F. Wiswall v. Sampson, 55 U.S. 52, 67, 14 L.Ed. 322 (1852). When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortagee's last known available address or by personal service." (Mennonite Board of Missions v. Adams, 462 U.S. at 798.)

The Court adds rigor to its rule, noting "a party's ability to take steps to safeguard its interests does not relieve the State of its consitutional obligation." Id. at 799.

> "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional pre-condition to a proceeding which will adversely affect the liberty or property interests of any party whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." Id. at 799. (Emphasis in original.)

B. The Decision of the Court of Appeal

The decision of the Court of Appeal holds that none of the above cases expressly rejects the use of posted notice and that the cases instead authorize a case by case appraisal of its constitutional adequacy. Taking into account a multitude of factors in land use adjudications, the court concludes that the notice was generally "reasonably calculated to apprise." (Opinion at p. 10, Appendix A.)

This Court's decision in Schroeder is distinguished on the ground that twenty-two notices were posted "along the seven or eight mile stretch of the river in the general vicinity of plaintiff's property" while in this case notices were posted "on public highways which adjoining property owners had to use in order to reach major stores or services." (Opinion at pp. 14-15, Appendix A.) Schroeder is likewise

distinguished on the ground that "statutory compensation rights were affected" and "post adjudicatory administrative relief was not available." (Opinion at p. 15, Appendix A.) Greene v. Lindsey is distinguished on the ground that the renter had a greater interest in residence in his apartment than a landowner has in peace and quiet.

C. The Mullane Test

Despite the vast number of land use adjudications which have occurred since the Mullane rule was first articulated, no court has yet ruled that the Mullane "personal notice requirement" extends to land use adjudications. The distinctions drawn by the California courts create a broad unexplained exception to the apparent universality of the Mullane rule.

The Mullane test, however, is unequivocally clear. One must employ notice as if "desirous of actually informing

the absentee." Mullane v. Central Hanover Tr. Co., supra, at 315. Notice by poster to an absent landowner fails this test.

One desirous of actually informing Mary Hayssen in Wisconsin would not rely upon a poster two thousand miles away from her known whereabouts. The County could not reasonably calculate that the Larsons in southern California, the Goldsmiths in central California, or Harvey Zoet in Michigan would pass by posted notices in Sonoma County in order to reach major stores or services.

For petitioner Hartnett, posted notice was also clearly inferior to notice by mail. He did not see the posted notice. He would have seen the notice had the County sent it by mail.

D. Impact Analysis

An attempt to distinguish this case from Greene v. Lindsey runs aground on the facts. It is certainly the rule that the

"extent to which procedural due process must be afforded . . . depends on the extent to which [the person affected] may be 'condemned to suffer a grievous loss.'" Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970). In some instances, a land use adjudication may involve minor impacts or no impact at all upon common law rights. But this is not such a case.

Prior to the 1977 adjudication, petitioners possessed the right to go to court to protect the quiet of their land. Greater Westchester Homeowner's Assn. v. City of Los Angeles, 26 Cal.3d 86, 91 (1979). This entitlement vests "by ancient law." Id.

Sonoma County has taken away this right. Pursuant to California Code of Civil Procedure §731a[3], petitioners are now denied

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[3] California Code of Civil Procedure §731a states in pertinent part: (continued)

the right to enjoin the BZA approved nuisance. See, e.g. North Side Property Owners' Assoc. v. Hillside Memorial Park, 70 Cal. App.2d 609 (1945); Kornoff v. Kingsburg Cotton Oil Co., 45 Cal.2d 265 (1955); Christopher v. Jones, 231 Cal.App.2d 408 (1964).

Petitioners' properties have now been essentially condemned with a noise easement. See, Griggs v. Alleghany County, 369 U.S. 84 (1962); Aaron v. City of Los Angeles, 40 Cal.App.3d 471 (1974), cert. den., 419

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3 (continued)

"Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of the State of California, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone or airport of any use expressly permitted therein. . . ."

U.S. 1122 (1975). Even the power of condemnation, however, does not authorize the government to take one man's property rights for the benefit of his neighbor. Hairston v. Danville & W.R. Co., 208 U.S. 598, 605, 606 (1908).

The writ of certiorari should therefore be granted to clarify the Mullane personal notice requirement.

II.

THE POSSIBILITY OF POST-ADJUDICATION REVIEW DOES NOT RELAX THE PERSONAL NOTICE STANDARD.

The decision below also attempts to distinguish Schroeder on the ground that the relief granted in Schroeder is different from the relief sought for and available in this case.[4] The court's analysis,

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[4] The 1979 complaint sought equitable redress in the form of declaratory and injunctive relief. Given the post-trial construction and operation of the sawmill, this case, upon remand, could include a request for damages from the County of Sonoma. While the Court of Appeal (continued)

confuses the due process notice standard with the relief available when due process rights have been denied.

This Court has drawn its line against such confusion. It has never "embraced the general proposition that a wrong may be done if it can be undone." Fuentes v. Shevin, 407 U.S. 67, 82; 32 L.Ed.2d 556 (1972). Thus in Armstrong v. Manzo, 380 U.S. 545 (1965), an adoption decree was entered by a divorced mother and her new husband without due process notice to the divorced father of the child. After the decree was entered, the father was notified of the adoption and promptly filed

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4 (continued) decision contests petitioners' ability to seek relief not specifically requested in the 1979 complaint, the right in a federal civil rights action to move to file a supplemental complaint to state post-trial facts, upon remand, cannot be seriously questioned. See, Texarkana v. Arkansas Louisiana Gas Co., 306 U.S. 188, 203 (1939).

a motion to set aside the decree and grant a new trial. The lower court, without setting aside the adoption decree, granted a hearing on the motion and "confirmed" the adoption decree. Id. at 549. This Court reversed, holding that where due process notice has been denied only "wiping the slate clean" cures the error:

> "A fundamental requirement of due process is 'the opportunity to be heard.' . . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded him in the first place." (Armstrong v. Manzo, 380 U.S. at 552.)

See also, Huntley v. North Carolina State Board of Education, 493 F.2d 1016 (4th Cir. 1974) (providing a de novo hearing does not undo the prejudice absent a clear ruling that the first hearing was invalid).

Petitioners' ambiguous rights under the use permit are therefore no substitute for due process. The right to be heard after a use permit has issued, or after the construction of a sawmill, obviously has less meaning than the right to be heard before the permit issues. A use permit deemed "properly issued" swallows rights and enthrones the use permit holder with statutory and constitutional entitlements. C.C.P. §731a; O'Hagen v. Board of Zoning Adjustments, 19 Cal.App.3d 151, 158-159 (1971); Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal.App.2d 776, 788-789 (1948); Miller and Starr, California Real Estate, §260.44[2]. The sawmill operator now has equities, despite the fact that it was a violation of the Constitution for the County to give him the rights of neighbors. Hairston v. Danville and W.R. Co., supra, at 605, 606.

The constitutional dilemna makes it difficult for any court to give full relief "to wipe the slate clean." Armstrong v. Manzo, supra, at 552. This, however, underscores the fundamental error of having waived the Mullane notice requirement in the first place and the need to vigorously explore judicial relief alternatives. While the wrong done in this case cannot necessarily be undone, it should not establish a mold for the future.

CONCLUSION

Although more than thirty years old, the authority of the Mullane personal notice requirement has been limited to the facts of that case and the opinions authored by this Court which follow it. Despite the innumerable land use adjudications which have occurred since Mullane v. Central Hanover Tr. Co. was first announced, no court has yet ruled that the Mullane notice requirements extend to land use adjudications

which take away basic property rights. No decision has yet enumerated the land use adjudication facts under which the rule might apply. California courts have now held that it does not apply at all.

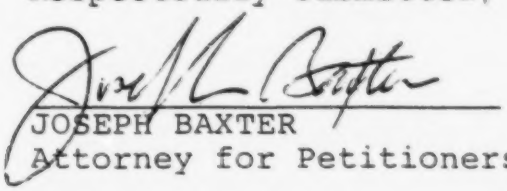
The Mullane personal notice standard shines as one of the most simple and benefic rules ever articulated by this Court. In an individual case the all important duty is satisfied by the mailing of a single letter. As a rule, it deserves universal application in all adjudications embracing individuals' fundamental property rights.

A clear pronouncement on the reach of the personal notice rule and further guidance of this Court are therefore required.

For these reasons, a writ of certiorari should be granted.

Dated: January 27, 1986.

Respectfully submitted,



JOSEPH BAXTER
Attorney for Petitioners

APPENDICES

"A" OPINION, COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE, FILED AUGUST 22, 1985

"B" PETITION FOR REIVEW DENIED, CALIFORNIA SUPREME COURT, FILED OCTOBER 30, 1985

IN THE
COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MARY HAYSSEN, et al.,

Plaintiffs, Appellants,
and Cross-Respondents,

v.

SONOMA COUNTY BOARD OF
ZONING ADJUSTMENTS,

Defendant, Respondent
and Cross-Appellant.

LOREN BERRY,

Real Party in Interest
and Cross-Appellant.

FILED:
AUGUST 22, 1985

No. A020841
Sup.Ct.No. 101851

PROCEDURAL HISTORY

This is an appeal from a judgment of the Sonoma County Superior Court entered on September 10, 1982. Plaintiffs Mary Hayssen, et al. (hereinafter appellants), a group of property owners in Sonoma County, filed a complaint against the Board of

Zoning Adjustments of the County of Sonoma on February 26, 1979. Demurrer on the complaint was sustained with leave to amend. Appellants filed their first amended complaint on June 5, 1979. Demurrer was again filed and was sustained without leave to amend as to the first and second causes of action. The demurrer to the third cause of action was overruled. A full evidentiary trial was held on the matter by the court on February 4, 5, 9, 17 and 18, 1981. Notice of intended decision was filed on May 27, 1981. Final judgment, together with findings of fact and conclusions of law requested by appellants pursuant to California Rules of Court, rule 232, was entered on September 10, 1982. Motions to vacate judgment and for a new trial were filed on October 20, 1982. The order denying the motions was entered on December 3, 1982. This appeal was timely filed on

January 3, 1983. (Cal. Rules of Court, rule 3(a) and (b).)

FACTS

On December 22, 1976, Loren Berry, the real party in interest in the instant case, applied to the County of Sonoma Planning Department for a conditional use permit for the construction and operation of a sawmill on a 30-acre site near the rural community of Cazadero. The site was zoned to permit the operation of a sawmill pending the receipt of a use permit. Pursuant to Government Code section 65905 and Sonoma County Code section 203.1 subdivision (a), the Sonoma County Board of Zoning Adjustments gave notice of a public hearing on the use permit. The public hearing was scheduled for January 27, 1977. Notice consisted of publishing and posting. Publication occurred on January 11, 1977, in the Sonoma County Press Democrat, a newspaper of general circulation within the

County of Sonoma. That same day, eight standard size notices of the projected use permit application and hearing were posted around the perimeter of the proposed sawmill site.

All notices contained a technical error in the description of the subject property. The error consisted of designating one of the bordering roads to the property by its pre-1975 name (Austin Creek Road) rather than by its 1977 name (Cazadero Highway). A parallel road was designated as Austin Creek Road after 1977. No other error in the description of the subject property is alleged.

None of the appellants attended the hearing. A neighboring property owner did attend, however. At the hearing, the Board of Zoning Adjustments granted Berry a conditional use permit for the construction and operation of the sawmill. By its terms, the permit was made subject to revocation

or modification by the Board upon a finding of substantial detrimental impact to neighboring persons or property.

Appellants are a group of property owners whose holdings adjoin or are in the vicinity of the disputed sawmill site. Appellants commenced the instant action against the Board of Zoning Adjustments more than two years after the use permit was granted in 1977. Some appellants received actual notice of the proposed sawmill construction before and after the January 1977 hearing. One appellant received actual notice of the proposed sawmill in April 1977. Between 1977 and 1979, the owner of the site engaged in substantial preparatory construction activity on the site in reliance upon the use permit.

Appellants in the court below alleged that a lack of proper notice as to the hearing violated their civil rights, giving rise to a claim of action under section 1983 of

title 42 of the United States Code. After a full evidentiary trial, the court below held that appellants failed to establish a cause of action under title 42, section 1983 of the United States Code and awarded costs and attorney's fees to defendant Board of Zoning Adjustments. Appellants appeal from this judgment.

Issues presented by the facts of this case are as follows: (1) whether notice by posting and publication in a land use adjudication is constitutionally adequate, or whether notice by mailing is required; (2) whether a finding of constitutionality is defeated by a technically deficient notice, where no prejudicial effect can be shown; and (3) whether appellants successfully asserted a cause of action under title 42, section 1983 of the United States Code.

I. CONSTITUTIONALLY ADEQUATE NOTICE

The due process clause of the Fourteenth Amendment requires, "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing. . . ." (Mullane v. Central Hanover Tr. Co. (1950) 339 U.S. 306, 313.) In Mullane, the United States Supreme Court articulated the standard to be applied in a due process challenge to adequacy of notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections." (Id., at p. 314.)

It is by now settled law that the property interests of adjacent landowners are at stake in a land use proceeding, and that procedural due process protections are

therefore invoked. (See Scott v. City of Indian Wells (1972) 6 Cal.3d 541, 549.) It is also settled law that the granting of a conditional land use permit, involving as it does the "application of general standards to specific parcels of real property," is adjudicatory in nature and therefore subject to notice and hearing requirements. (Horn v. County of Ventura (1979) 24 Cal.3d 605, 614; San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal.3d 205, 212, appeal dism. 427 U.S. 901 (1976).)

These principles are embodied in state and local regulatory schemes. Government Code section 65905, as originally enacted in 1965, states in relevant part: "notice of hearing [for a conditional use permit] shall be given by notice through the United States Mails . . . or by both publication in a newspaper of general circulation . . . and posting said notice in conspicuous

places close to the property affected." (Stats 1965, ch. 1880, § 6, p. 4350.)[1/] Sonoma County Code section 203.1, subdivision (a) provides for a ten-day notice of use permit hearings by mail "or by publication in a newspaper of general circulation and posting in at least three (3) places on or near the property which was the subject of the hearing. . . ."

The facts in the instant case indicate that notice of the land use hearing was published in a county newspaper of general circulation and was posted at eight locations around the perimeter of the subject property 16 days prior to the actual hearing, thus exceeding then-current state and local requirements. The court below held

---

1. This code section was amended in 1984 to require notice by mail. (Gov. Code, §§ 65905, 65091, added by Stats. 1984, ch. 1009, p. 28.) However, statutes are not to be applied retroactively in the absence of a clear legislative intent.

that these publication and posting procedures fully met the "reasonably calculated to apprise" standard of Mullane. We affirm.

In Mullane, the United States Supreme Court held that statutory notice of a judicial accounting by publication alone was insufficient as to known beneficiaries of a common trust fund whose addresses were on record. (Mullane, supra, 339 U.S. at pp. 318-319.) The rights of the trust beneficiaries were wholly cut off by the accounting procedure. (Id., at p. 311.) Under these facts, the Mullane court required notice by mailing. (Id., at p. 319.)

Appellants contend that since their mailing addresses were also on record with the county, notice of mailing was also required in this case. We note, however, that the Mullane decision requiring mailing was specific to the facts of that particular case. The Mullane court did not hold notice and publication to be per se

constitutionally inadequate, nor did it hold notice by publication and posting to be inadequate in land use proceedings. Indeed, by announcing the flexible notice-reasonably-calulated-to-apprise standard, the Mullane court expressly approved a case-by-case determination of the sufficiency of a constitutionally required notice. This case-by-case determination was approved in a United States Supreme Court decision, Greene v. Lindsey (1982) 456 U.S. 444, 451.

The California Supreme Court has also expressly approved a flexible notice requirement. "We deliberately refrain from describing a specific formula which details the nature, content, and timing of the requisite notice. We do observe, however, that depending on (1) the magnitude of the project, and (2) the degree to which a particular landowner's interest may be affected, acceptable techniques might include notice by mail to the owners of record of property

situate [sic] within a designated radius of the subject property, or by the posting of notice at or near the project site, or both." (Horn v. County of Ventura, supra, 24 Cal.3d at p. 618.) A case by case determination of the constitutional adequacy of notice thus continues to be the rule.

Appellants rely on Schroeder v. City of New York (1962) 371 U.S. 208, for the proposition that notice by mail is required in land use permit proceedings. Schroeder involved a condemnation proceeding whereby the City of New York acquired water diversion rights to a river flowing by the plaintiff's property. The United States Supreme Court held that "in the circumstances of this case," posting and publication as required by statute did not meet the Mullane standard. (Id., at p. 211.) The court therefore ruled that the plaintiff in that case could proceed with her compensation claim despite the

tolling of the applicable statute of limitations. (Id., at p. 214.)

Schroeder, however, can be distinguished from the instant case in several important aspects. First, we note that Schroeder involved a condemnation proceeding in which statutory compensation rights were affected. (Id., at p. 210.) No such rights are at issue here. Appellants here applied to the court below for injunctive and declaratory relief, and are barred from asserting any damage claims at this stage in the proceedings.

Second, as noted by the Schroeder court, the Mullane notice requirement as to legally protected interests "is obviously a vital corollary to one of the most fundamental requisites of due process--the right to be heard." (Id., at p. 212.) Appellants allege that under California law, the use permit hearing constitutes a final adjudication, depriving appellants of the right

to enjoin the normal operation of the sawmill under a nuisance theory. However, under the terms of the conditional use permit, as noted above, appellants and others have a continuous and permanent right to be heard by the Board of Zoning Adjustments as to any proposed revocation or modification of the use permit based on detrimental impact to their persons or property. Such post-adjudicatory administrative relief was not available under the Schroeder or indeed the Mullane facts.

Third, in Schroeder the City of New York posted 22 notices along a seven or eight mile stretch of the river in the general vicinity of plaintiff's property. This posting was found to be insufficient to apprise the Schroeder plaintiff of the proposed condemnation proceedings. (Schroeder, supra, at p. 210.) By way of contract, the property at ~~issue~~ here was surrounded by notices posted along all the major roads leading

from the proposed sawnill site to neighboring communities. The county could reasonably calculate that posted notices on public highways which adjoining property owners had to use in order to reach major stores or services would apprise them of the contemplated action.

Appellants also rely on Greene v. Lindsey, supra, 456 U.S. 444, to suggest that the United States Supreme Court now disapproves of posted notice altogether. In Greene, a Kentucky statute permitting service of process by notice posted on a tenant's door in an unlawful detainer action and eviction proceeding was found to be constitutionally inadequate as applied to tenants in a housing project. (Id., at pp. 445, 456.) Appellant goes far beyond the holding of Greene in suggesting that the case bars all notice by posting under the Mullane standard. In Greene, the court found notice by posting unreliable because

of evidence that such notices were often torn down by children and others in the housing project. (Id., at p. 453.) No such evidence of notices being physically removed by nonparties has been introduced here. In addition, the Greene court looked to the magnitude of the interest involved, that is, the right of continued residence in the home, in reaching its determination that the posted notice was inadequate. (Id., at p. 451.) We do not find the alleged noise easement asserted by appellants in the instant case to be the equivalent of the interest in continued residence in the home asserted by the Greene plaintiffs. Nor do we find the alleged noise easement to equal the interest in continued welfare entitlements to benefits in Goldberg v. Kelly (1970) 397 U.S. 254, as appellant would suggest.

In summary, we find that the court below was clearly within the boundaries of applicable federal and state authority when it

found the posting and publication notice to be constitutionally adequate under the facts of the instant case, and we therefore do not disturb that finding.

II. TECHNICALLY DEFICIENT NOTICE

Having held that notice by publication and posting is constitutionally adequate under the facts of the instant case, we now turn to the question of whether a technical deficiency in the notice defeats its constitutionality where no prejudicial effect is shown. The facts indicate that notice of the January 27, 1977, hearing erroneously designated one of the bordering roads to the proposed sawmill site by its pre-1975 name. In all other respects, the parcel was correctly described. The property was fully posted, with eight standard size notices placed around the perimeter.

Former Government Code section 65801 states that "[n]o action . . . regarding any zoning matter by any . . . administrative

body . . . shall be held void or invalid or be set aside by any court . . . by reason of any error . . . as to any matter pertaining to . . . notices . . . unless after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of was prejudicial, and that by reason of such error the party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error had not occurred or existed. There shall be no presumption that error is prejudicial or that injury was done if error is shown." (Stats 1965, ch. 1880, § 6, p. 4346.)[2/]

Appellants argue that former Government Code section 65801 may not limit the scope of constitutional rights, nor do we disagree.

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2. Repealed in 1984, and replaced by Government Code section 65010, containing substantially similar language.

However, since we do not find a constitutional right to notice by mailing in the instant case, appellant's argument is inapposite. We therefore turn to the question of whether prejudice resulted from the technical defect in the notice.

The court below found that while the property was properly posted and notice of the hearing was regularly published, no appellant saw the posted or published notice, and therefore appellants were not misled by the error in the description of the property. Appellants cannot therefore assert that prejudice resulted from the technical error, or that a different result would have obtained if such error had not occurred or existed. The court below also found that both before and after the hearing date, persons residing on the named appellant's property, including a co-owner, acted as watchmen on the proposed sawmill site and were advised by Berry that he was in the process of building a sawmill.

Actual notice of the proposed sawmill was received by another appellant in April 1977. There is thus little possibility that appellants would have been fatally misled by the incorrect designation of one of the bordering roads to the property in question if they had seen the notice. Between 1977 and 1979, the owner of the site engaged in substantial preparatory construction on the site in reliance on the use permit. Appellants thus had received both actual and constructive notice of the sawmill construction during the two year period prior to the initiation of this suit. They therefore had and continue to have ample time to initiate proceedings with the Board of Zoning Adjustments as to a proposed modification or revocation of the use permit. Since appellants did not rely on the notice, and in fact knew about the proposed sawmill construction on the site well in advance of its actual construction, and also have a

continuous right of appeal to the Board of Zoning Adjustments, we find that no prejudice to appellants' interests resulted from the technical error in the notice. Thus, technical error cannot be used to defeat our finding of a constitutionally adequate notice in the instant case.

III. SECTION 1983 ACTION

Finally, we turn to the issue of whether appellants successfully asserted a cause of action under title 42, section 1983 of the United States Code. Section 1983 is a federal civil rights statute dating from 1871. It states in relevant part: "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings for redress."

While section 1983 asserts a federal cause of action, the United States Supreme Court has clearly recognized that a state court can exercise jurisdiction over a section 1983 claim. (Maine v. Thiboutot (1980) 448 U.S. 1, 3, fn.1.) Although early case law held that local governments were immune from suit under section 1983 (Monroe v. Pape (1961) 365 U.S. 167, 187) this holding was specifically overruled in Monell v. New York City Dept. of Social Services (1978) 436 U.S. 658, 663. In Monell, the United States Supreme Court concluded that a municipality or other local governing body was a person for purposes of section 1983 and could be sued as such "for monetary, declaratory, or injunctive relief." (Id., at p. 690.)

There are two elements to stating a cause of action under section 1983. The

plaintiff must first show a deprivation of a constitutional right, and secondly, must show that the defendant was acting under color of state law in depriving the plaintiff of this right. (13B Wright, Miller & Cooper, Federal Practice and Procedure (2d ed., 1984) § 3573.2, p. 203.)

As to the first element, section 1983 is not a source of substantive rights but provides a forum for a remedy only. A substantive right must be found in the Constitution or in federal law. (Idid.; Chapman v. Houston Welfare Rights Org. (1979) 441 U.S. 600, 617-618.) The court below found that appellants did not establish a violation of the constitutional notice requirement, and we affirmed. Therefore, appellants have failed to establish the first element of a section 1983 cause of action, and we therefore need not address the second element.

In summary, we find that the notice provided by defendant Board of Zoning Adjustments meets constitutional standards and is not defeated by any technical error contained therein. We further find that appellant fails to establish a section 1983 cause of action.

The judgment of the court below is hereby affirmed.

CERTIFIED FOR PUBLICAION

White, P.J.

We Concur:

Scott, J.

Merrill, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 3

No. A020841

IN THE

SUPREME COURT OF THE

STATE OF CALIFORNIA

HAYSSEN, et al.,

Appellants and Cross-Respondents,

v.

SONOMA COUNTY BOARD OF ZONING ADJUSTMENTS, etc.,

Respondent and Cross-Appellant;

BERRY,

Real Party in Interest and Cross-Appellant.

FILED: SUPREME COURT
October 30, 1985
Laurence P. Gill, Clerk
/ss/ DM
Clerk

Petition for review of appellants and cross-respondents DENIED.

/ss/ BIRD
Chief Justice

Supreme Court, U.S.
FILED
APR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1283

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1985

MARY HAYSSEN, ALLEN B. GOLDSMITH, JEANIE A. GOLDSMITH, HARVEY ZOET, BARBARA LARSON, ROBERT L. LARSON and EDWARD HARTNETT,

Petitioners,

vs.

BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA

Respondent.

/

LOREN M. BERRY,

Real Party In Interest

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To The Court of Appeal State of Calfiornia First Appellate District

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QUESTION PRESENTED

1. Did the trial court and California Court of Appeal apply the correct standard of review in determining that the notice procedures employed by the County of Sonoma, Board of Zoning Adjustments, as a prerequisite to a use permit hearing, comlied with due process requirements?

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OCTOBER TERM 1985

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Petitioners,

vs.

BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA

Respondent.

/

LOREN M. BERRY,

Real Party In Interest

OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI
To The Court of Appeal
State of Calfiornia
First Appellate District

Respondent the Board of Zoning Adjustments of the County of Sonoma (hereinafter referred to as the "BZA") hereby respectfully opposes the Petition for Certiorari filed with the court by petitioners Mary Hayssen, Allen B. Goldsmith, Jeanie A.

Goldsmith, Harvey Zoet, Barbara Larson, Roberts L. Larson and Edward Hartnett, and pray that the Writ of Certiorari be denied.

OPINION BELOW

Petitioners claim constitutional error in the opinion of the Court of Appeal , the State of California, First Appellate District. This opinion is appended to petitioners' Writ of Certiorari.

STATEMENT OF CASE

Despite the tremendous briefing supplied by petitioners to three California State Courts, and finally this Court, this lawsuit concerns a single issue: the constitutional adequacy of the notice procedure employed by the BZA of a particular use permit hearing. The arguments raised in this petition were all raised and considered below. Significantly, all state courts below employed the correct standard of review of the notice procedures: Mullane and its progeny. Simply, petitioners completely fail to identify constitutional error in the California Court of Appeal opinion below.

On January 27, 1987, the BZA,following a public hearing, granted the real party in interest, Loren Berry,a use permit allowing construction of a saw mill. This use permit was the final step in a long administrative approval process. The saw mill is presently operational and has been for several years.

The petitioners, persons who apparently own real property near the saw mill, challenge the notice procedure for the use permit hearing utilized by the BZA. This notice procedure consisted of posting eight formal notices of the hearing around the perimeter of Loren Berry's property. In addition, notice of the hearing was published in the Sonoma County Press Democrat newspaper on January 11, 1977. The Press Democrat is Sonoma County's largest newspaper.

Significantly, the procedures utilized by the BZA are specifically approved both by local ordinance (Sonoma County) and by California State statute. Both the Sonoma

County Trial Court and the California Court of Appeal, utilizing well-established standards of review explicitly determined that the noticed method utilized by the BZA was constitutionally adequate.

Notwithstanding that both the trial court and the California Court of Appeal utilized the correct standard of review -- indeed, the standard discussed at length by petitioners (Mullane) ; notwithstanding that the notice procedures utilized exceeded both state statute and local ordinance; notwithstanding that the adequacy of notice involved issues of fact decided adversely to petitioners, petitioners here have simply raised once again the sum total of all arguments previously presented and considered by California courts since 1979. This appeal presents absolutely nothing that has not been considered at least three times before. Indeed, a review of the California Court of Appeal opinion reveals consideration by that court of exactly the same law presented

in the petition.

This petition is therefore without merit, frivolous and should be denied.

ARGUMENTS FOR DENYING THE PETITION

I. The Courts Below Applied The Correct Standard Of Review To The Facts Before Them The Notice Employed was Constitutional .

Despite the vast amount of case law presented by petitioners concerning the standard of review for determining constitutionality of a particular notice procedure, this standard of review is actually well settled:

> An elementary and fundamental requirement of due process in any proceeding which is to:accord finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Emphasis added]
>
> Mullane v. Central Hanover Bank & Trust (1950) 339 U.S. 306, 314

Notwithstanding petitioners arguments, this standard of review was the one precisely employed by both the trial court as well as

the Court of Appeal (see Court of Appeal opinion, pages 4 and 5). The trial court's findings have been thoroughly reviewed and no error therein was demonstrated by petitioners. Instead, petitioners vaguely challenge the standard of review employed. This argument is without merit. The correct standard of review was applied.

In Greene v. Lindsey (1982) 456 U.S. 444, the court explained that in assessing whether constitutionally sufficient notice was provided, the trier of fact must "look to the realities of the case before [it]". See also Anderson National Bank v. Luckett (1944) 321 U.S. 233 (constitutional adequacy of notice must be read in the light of factual context). The courts below clearly applied the appropriate law in determing that the notice procedure utilized by the BZA was constitutionally adequate in terms of the factual context of this case.

II. Despite Appellants' Arguments Neither Mullane Nor Its Progeny Require Personal Notice: The Mullane Standard Was Applied By The Courts Below .

This is not a "no notice" type of case. The BZA utilized posting and publication notice procedures specified by Sonoma County ordinance and by California State statute. Petitioners argue that the notice procedures employed were constitutionally defective: petitioners argue that the constitution insists upon personal notice in this case.

However, despite petitioners' protestations, Mullane and its progeny simply do not require personal notice in all land use adjudication situations. Indeed, in Schroeder v. City of New York (1962) 371 U.S. 208, this court unambiguously held that posting of publication may be constitutionally adequate in the land use adjudication context. Indeed, in Schroeder, this court intimated that proper posting of notices would have been constitutionally adequate. Id. at p. 213. (See also Horn v. County of Ventura [1979] 24 Cal.3d 605, 618; the California Supreme

Court holding that posting of notice at the subjugated site may be appropriate at the discretion of the local government.)

In short, the standard of review set forth by this court does not hold that posting and publication is per se unconstitutional. To the contrary, every court considering that issue has held such notice procedures to be proper depending upon the factual context. The Mullane standard is fact specific. The Mullane standard was applied in this case. The facts, of course, cannot be redetermined by this court. Simply, both the trial court and the reviewing court below applied the Mullane analysis to the facts before them. Their holdings that the notice utilized by the BZA was constitutional should not be disturbed.

III. The Notice Procedure Utilized Exceeded Existing State Law And Local Regulation Granting This Writ Would Jeopardize Innumerable Administrative Hearings

The method of posting and publication

utilized by the BZA exceeded the method of notice expressly sanctioned by California State Law and Sonoma County local regulations.

California Government Code Section 65905 (applicable at the time of the notice herein; see court of Appeal opinion, note 1, page 5) provides:

> Whenever an application for a variance or a conditional use permit or other permit or revocation or modification of same or an appeal from the action taken thereon is submitted to the body or person charged with conducting a public hearing thereon, is submitted to the body or person charged with conducting a public hearing thereon, notice of hearing shall be given by notice through the United States mails, with postage prepaid using addresses from the last equalized assessment roll or by alternatively from such toerh records of the assessor or the tax collector as contained more recent addresses in the opinion of said body, or by both publication in a newspaper of general circulation in accordance with Section 65854 and posting said notice in conspicuous places close to the property affected. Procedure for mailing or posting of said notice shall be governed by the provisions of the local ordinance. [Emphasis added]

The County of Sonoma local ordinance, as referred in the last sentence of the pre-

ceeding Government Code Section, provides:

> Section 203.1(a): At least ten days' notice of all hearings required by Sections 26-208 and 203 [hearings on questions of permitted uses] shall be given by the Planning Director through the United States mails with postage prepaid to all persons shown on the last equalized assesment roll as assessors of parcels of real property within three hundred (300) feet of the parcel wherein the subject use is to be located or by publication in a newspaper of general circulation and posting in at least three (3) places on or near the property which is the subject of the hearing provided, however, that in the event of an appeal from an administrative determination by any official of the County of Sonoma in connection with the administration of this Chapter, the Planning Director need only notice the time and place of the hearing to the appellant in a manner he deems just and equitable. [Emphasis added.]

By publishing and posting notice, the BZA exceeded existing state law and local regulation. The BZA's compliance with state law and local notice procedures is uncontroverted. In Newberry Springs Water Association v. County of San Bernardino (1984) 150 Cal.App.3d 740, the Court held that:

> The legislature has *** [affirmed] the general principle that statutory requirements for public notice are fulfilled if the public agency makes a good faith effort to follow the procedures prescribed by law for giving notice.

Granting the petition herein would jeopardize the results of innumerable administrative hearings held pursuant to the statutory scheme.

IV. Post Adjudicatory Rights Contained In The Use Permit Merely Provide An Additional Basis For Finding The Notice Method Used Was Adequate

Appellants argue that the post adjudicatory rights provided in the use permit do not comport with due process requirements. Appellants cite numerous cases which hold that post adjudicatory rights may not be a substitute for due process in the first place. Those cases are inapposite here. As previously stated this is not a "no notice" case. Constitutionally adequate notice posting and publication was given.

In the California Court of Appeal's discussion, the Court notes that the use permit

provides for the County of Sonoma's continuing jurisdiction over the saw mill. This certainly is one relevant factor in considering the constitutional adequacy of the notice. The use permit's post adjudicatory rights granted to persons such as the petitioners are not viewed by the California Court of Appeal as a "substitute" for due process. Contrary to petitioners arguments, these rights do not "relax the personal notice standard." Mullane simply does not require personal notice. Post adjudicatory rights are relevant in determining whether the notice procedures utilized were constitutionally adequate.

V. Posting And Such For A Publication Are Especially Proper In Situations Involving Land Use Administration

All the cases cited by petitioners which hold publication and posting insufficient concern drastic taking of property interests. In fact, there is abundant authority upholding publication and such or posting of

in situations involving land use administration, where the results of such administration merely affect, rathern than deprive, land owners of property. For example, a number of New York cases reject the notion that due process requires mailed notice in land use proceedings. Zartman v. Reisem (1977) 399 N.Y.S.2d; Retzler v. County Executive (1971) 324 N.Y.S.2d 393. See also Cook v. Marple Tp. Zoning Hearing Board (Penn. 1980) 483 A.2d 1105, 1106 (published notice sufficient for hearing regarding construction of a private racquet ball club in a residential district).

Moreover, the Court of Appeals observance of the fact that the use permit retains jurisdiction with the County of Sonoma indicates adherence to the principal that the form of notice utilized depends upon the nature and severity of the land use. (See Court of Appeal Opinion, page 7).

CONCLUSION

The sole issue in this case is the

constitutionality of notice procedures utilized by the BZA in connection with a particular use permit hearing over nine years ago. Utilizing the well-settled principles of Mullane and its progeny, the trial, following a full evidenciary trial spanning five days, decided this factual issue adverse to appellants. Petitioners appealed, bringing forth the same arguments raised in this petition. In a thorough published opinion, the Court of Appeal considered each and eveyr argument and affirmed the trial court's holding.

Contrary to petitioners' claims, neither Mullane nor its progeny require personal notice. Contrary to petitioners arguments, both the trial court and the California Court of Appeal applied the Mullane standard of review in determining that the notice procedure utilized by the BZA was constitutionally adequate.

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Dated: April 17, 1986

TARKINGTON, O'CONNOR & O'NEILL
A Professional Corporation

By _____
Gregory P. Einhorn
Attorney for Respondent
BOARD OF ZONING ADJUSTMENT
OF THE COUNTY OF SONOMA

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of 18 years and not a party to the within above-entitled action; my business address is 350 "E" Street, Santa Rosa, California 95404. On the below mentioned date, I served the within attached document(s) entitled: OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

on the attorneys of record in said action by placing a true and correct copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Rosa, California, addressed as follows:

Joseph Baxter, Esq.
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Post Office Box 37
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I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 18, 1986

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Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 85-1283

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1985

MARY HAYSSEN, ALLAN B. GOLDSMITH, JEANIE A. GOLDSMITH, HARVEY ZOET, BARBARA LARSON, ROBERT L. LARSON, and EDWARD HARTNETT,

Petitioners,

vs.

BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA,

Respondent.
_____/

LOREN M. BERRY,

Real Party in Interest.
_____/

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

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(707) 575-7715

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22pp

QUESTIONS PRESENTED

1. Does this case merit consideration by the Court in light of subsequently enacted state legislation which now requires notice by mail?

2. Is this case moot because petitioners cannot obtain either equitable relief or monetary damages?

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NO. 85-1283

IN THE SUPREME COURT

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BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA,

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REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is an action under 42 U.S.C. §1983 for equitable relief from Sonoma County's allegedly unconstitutional procedure for giving notice of use permit hearings.

Any inaccuracies and omissions in the Petition's Statement of the Case are not addressed at this time, since the ensuing argument concerns lack of public importance and mootness, rather than the merits of the Petition.

REASONS FOR NOT EXERCISING POWER OF REVIEW

I

THIS CASE DOES NOT PRESENT ISSUES OF GENERA OR PUBLIC IMPORTANCE, DUE TO SUBSEQUENT ENACTMENT OF A STATUTE CURING THE ALLEGED CONSTITUTIONAL DEFECT.

The issue presented by the petition for writ of certiorari is whether notice by mail is constitutionally required in a land use adjudication.

Since the action complained of here, the California Legislature enacted a statute requiring mailed notice of hearings for conditional use permits:

> "Notice of the hearing shall be mailed or delivered at least 10 days prior to the hearing to all owners of real property as shown on the latest equalized assessment roll within 300 feet of the real property that is the subject of the hearing. In lieu of utilizing the assessment roll, the local agency may utilize records of the county assessor or tax collector which contain more recent information than the assessment roll. If the number of owners to whom notice would be mailed or delivered pursuant to this paragraph or paragraph (1) is greater than 1,000, a local agency, in lieu of mailed or delivered notice, may provide notice by placing a display advertisement of at least one-eighth page in at least one newspaper of

> general circulation within the local agency in which the proceeding is conducted at least 10 days prior to the hearing."
>
> Government Code §65091(3) (enacted 1984)[1]

In addition to notice by mail, posting or publication is also required. Government Code §65091(4). §65091 applies to applications for conditional use permits (Government Code §65905)

Under the standards governing this Court's power of review, the present case is an inappropriate vehicle for exercise of the Court's discretionary jurisdiction. Supreme Court Rule 17 requires that the Court's jurisdiction be exercised "only when there are special and important reasons" therefor. In order to justify the establishment of Circuit Courts of Appeal in 1891, it was necessary to view certiorari as "a power

[1]The Court of Appeal in its decision noted the enactment of the statute requiring mailed notice. (Opinion at p. 9, Appendix A, to Petition.)

which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise". Forsyth v. Hammond 166 U.S. 506, 514-515 (1897).

The Court's discretionary jurisdiction enables it to discharge its indispensible functions while relieving it of the duty of adjudication in cases that are important only to the litigants. Accordingly, the writ of certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties..." Layne & Bowler Corp. v. Western Well Works, Inc. 261 U.S. 387, 393 (1923). Thus, the cornerstone for a petition for certiorari is a showing that the question to be reviewed is one of general importance.

The enactment of Government Code §65091 resolves the constitutional issue urged by petitioners. Notice by mail to adjacent and nearby landowners is now required in California. Therefore, the present case no longer has any general or public importance. In similar circumstances, this Court has refused to exercise its jurisdiction to decide an issue. In Rice v. Sioux City Memorial Park Cemetery, Inc. 349 U.S. 70 (1955) plaintiff brought an action for damages for defendant cemetery's refusal to bury her husband, an Indian. The issue presented was whether the Fourteenth Amendment prohibited a state court from entertaining a defense based on a racially restrictive covenant. Subsequent to commencement of the litigation, the state enacted a statute prohibiting the conduct in question. After full briefing and argument, this Court dismissed the Writ as improvidently granted because the corrective legislation reduced the case to one of "isolated significance". (Id. at 76.) The Court stated:

> "[T]his Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted]. 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." (Id. at 74.)

Many times this Court has declined jurisdiction due to subsequent statutory changes. See Paulussen v. Herion 86 Daily Journal DAR 1062 (March 25, 1986) (enactment of new state statute of limitations of uncertain application; Court declined to address federal issue "until it is clearly necessary to do so"); Kremens v. Bartley 431 U.S. 119 (1977) (new statute enacted after Supreme Court noted probable jurisdiction completely repealed provisions declared unconstitutional below; remanded for reconsideration of class definition, so as to exclude moot claims); Cook v. Hudson 429 U.S. 165 (1976) (since grant of certiorari, Supreme Court decision and new state statute prohibit the conduct complained of; writ

dismissed as improvidently granted): Hall v. Beals 396 U.S. 45 (1969)(statutory amendment reducing voter's residency requirement rendered the case moot). Where the issue sought to be reviewed concerns a statute that has been repealed, the issue does not merit consideration by the Supreme Court. District of Columbia v. Sweeney 310 U.S. 631 (1940) (cert denied "in view of the fact that the tax is laid under a statute that has been repealed and the question is therefore not of public importance").

Similarly, this principle of restraint is also applied where subsequent judicial decisions render the constitutional issue problematic. New York v. Uplinger 467 U.S. 246 (1984) (writ dismissed after full briefing and argument); Piccirillo v. New York 400 U.S. 548 (1971).

Petitioners argue that this case "should not establish a mold for the future". (Petition, p. 29) Obviously, it does not. Government Code §65091 prevents the present issue from

arising again in California, and reduces Petitioners' action to one of isolated significance. Thus, this case has no general public importance and does not merit review by this Court.

II

THIS CASE IS MOOT SINCE NEITHER EQUITABLE RELIEF NOR MONETARY DAMAGES IS AVAILABLE.

Not only is this case lacking in public importance, but it is moot as well.

A. Declaratory and Injunctive Relief.

Petitioners' request for "[a] clear pronouncement on the reach of the personal notice rule" (Petition, p. 30) is moot since enactment of Government Code §65091 requiring notice by mail. In light of the Legislature's action, it would be improper to declare the County's notice procedure unconstitutional, since there is no continuing violation of federal law to declare invalid, nor is there a continuing violation of federal law to enjoin. See Green v. Mansour, 474 U.S. ___, 88 L. Ed. 371, 106 S. Ct. ___ (1985) (class action regarding miscalculation of AFDC

benefits and right to notice of lost benefits). It would be meaningless to enjoin the County's former notice procedure, or to grant any other type of prospective relief. Nor is there any evidence of a threat of recurrence of allegedly unconstitutional notice practices. See Green v. Mansour, supra, at 380; Goodrich v. Gonzalez 451 F. Supp. 747, 750 (E.D. N.Y. 1978).

Furthermore, any attempt to now set aside the use permit granted in 1977 must clearly fail, as Petitioners themselves virtually concede ("Given the post-trial construction and operation of the sawmill, this case, upon remand, could include a request for damages from the County of Sonoma." Petition, p. 25. "A use permit deemed 'properly issued' swallows rights and enthrones the use permit holder with statutory and constitutional entitlements." Petition, p. 28. "While the wrong done in this case cannot necessarily be undone..." Petition, p. 29. "Upon retrial, the owner of the sawmill will undoubtedly urge equities associated with the passage of time

since the decision of the trial court and the completion of the sawmill in reliance upon the decision. Thus, upon retrial, the most appropriate remedy may be damages." Appellants' (Petitioners') Opening Brief, California Court of Appeal, p. 30.)

In summary, changes in state law have rendered moot Petitioners' claims for prospective relief, since the allegedly unconstitutional notice procedures are no longer in effect. And, Petitioners themselves recognize the futility of attempting to set aside the use permit after the construction and many years of operation of the sawmill.

B. Damages.

Since initiating this action in 1979, Petitioners have never stated a claim for damages against either the County or Loren Berry, owner of the sawmill and Real Party in Interest. Nonetheless, Petitioners suggest that upon remand they may be allowed to amend to request damages against the County. Petition, p. 25.

First, it is pure speculation to assume a court will in the future allow Petitioners to amend their action to state a monetary claim.

Second, under California law, the remedy of monetary damages is not available to landowners allegedly harmed by land use adjudications. Agins v. City of Tiburon 24 C 3d 266 (1979) held that an owner who is deprived of substantially all beneficial use of his land by a zoning ordinance is not entitled to an award of damages in an inverse condemnation proceeding. His exclusive remedy is invalidation of the ordinance in an action for mandamus or declaratory relief. This Court affirmed Agins, while leaving open the question of whether governments must pay damages to landowners whose property allegedly has been taken. Agins v. City of Tiburon 447 U.S. 255 (1980)[2]

[2]The issue has not yet been decided by this Court. Williamson Planning Commission v. Hamilton Bank 473 U.S. ___, 87 L. Ed. 2d 126, 105 S Ct. ___. (1985)

California courts have applied the rationale of Agins to land use adjudications in general, Palmer v. City of Ojai 178 Cal. App. 3d 280 (1986) (developer's action for mandate and damages for City's failure to issue building permit); to section 1983 claims, Palmer, supra; Gilliland v. County of Los Angeles 126 Cal. App. 3d 610 (1981); and to rent control ordinances, Fisher v. City of Berkeley 37 Cal. 3d 644 (1984), among other actions.

Petitioners may not recover monetary damages against Loren Berry, Real Party in Interest. Clearly, it is the government agency, not Berry, that owes the duty of constitutionally adequate notice. Even assuming arguendo, that Berry is somehow implicated in this Section 1983 action, he is not liable in damages to Petitioners. To establish personal liability in a Section 1983 suit against a public official, plaintiff must show that the defendant violated "clearly established" constitutional rights. Harlow v. Fitzgerald 457 U.S. 800 (1982).

Petitioners concede that "no court has yet ruled that the Mullane 'personal notice requirement' extends to land use adjudications". Petition, p. 21. Obviously, Petitioners had no "clearly established" right to notice by mail, and therefore, no individual can be held personally liable in this action.

CONCLUSION

This Court's limited judicial resources should be applied to cases that have broad significance beyond the interests of the particular litigants. Petitioners failed to bring to the Court's attention the subsequent legislation implementing the very standard that Petitioners espouse. Petitioners' case now has only isolated significance. Petitioners are entitled to a trial and to a careful appellant review, which they had. They are not entitled to a Supreme Court review, which is reserved for important questions of law for the public benefit.

Finally, this case has only academic significance even to the Petitioners.

Prospective declaratory or injunctive relief are meaningless in light of the new statute requiring notice by mail. Petitioners concede the unlikelihood of revocation of the use permit relied upon for many years by Berry, Real Party in Interest. Nor can Petitioners recover damages against the County or Berry, under established California and federal law. Petitioners do not have any real stake in this Court's decision. The case is moot.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

Thomas R. Kenney
Attorney for Real Party in Interest, Loren M. Berry

NO. 85-1283

SUPREME COURT OF THE UNITED STATES

MARY HAYSSEN, ALLAN B. GOLDSMITH, JEANIE A. GOLDSMITH, HARVEY ZOET, BARBARA LARSON, ROBERT L. LARSON, and EDWARD HARTNETT,

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vs.

BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA,

Respondent.

_____/

LOREN M. BERRY,

Real Party in Interest

_____/

CERTIFICATE OF SERVICE

BY MAIL

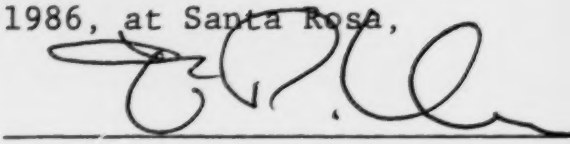
I hereby certify that I am a member of the U. S. Supreme Court bar and that I have on this date served a copy of the attached Real Party In Interest's Brief in Opposition to Petition for Writ of Certiorari by depositing it in the U. S. Mail, first class postage prepaid, at 730 Second Street, Santa Rosa, California, and addressed to:

Joseph Baxter, Esq.
Main Street
P. O. Box 37
Duncans Mills, CA 95430

Gregory P. Einhorn
Tarkington, O'Connor & O'Neill
350 E Street, Suite 200
Santa Rosa, CA 95404

I further certify that all parties required to be served have been served.

Dated: May 2, 1986, at Santa Rosa, California.



Thomas R. Kenney

Supreme Court, U.S.
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REPLY TO OPPOSITION

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REPLY TO OPPOSITION

I.

THIS CASE PRESENTS ISSUES OF GENERAL PUBLIC IMPORTANCE.

The Opposition to Petition for Writ of Certiorari brief filed by the County of Sonoma urges that neither Mullane nor its progeny establish a personal notice

requirement when fundamental property rights are adjudicated. The New York and California cases cited by respondent suggest the national dimensions of the issue. Petitioners submit that respondent's constitutional approach will persist until it is dealt with by this Court.

Recent California legislation cited by real party in interest does not resolve the broad issues of this case. Had the legislation been in effect, it would not have guaranteed either better notice or rights of enforcement.

The California legislation, by creating a statutory hybrid of personal and impersonal notice rights, eclipses the rights of many of those who have a fundamental stake in the outcome of the use permit hearing. The arbitrary 300 foot limit applies to all uses--including toxic waste sites, nuclear power plants, sawmills and dumps--irrespective of actual impact. Government Code § 65091 thus would not have

produced adequate notice in this case. The BZA authorization at 400 feet produces speech interference with up to an eightfold increase in noise levels (R.T. 204:5-205:23; 208:17-209:3; J.A. 529-536). The Goldsmith and Zoet properties, over 500 feet away from the sawmill, experience a doubling of ambient noise levels (R.T. 257-259:17). The Larson house, over 300 feet from the sawmill property and over 1,000 feet from the sawmill, suffers a quadrupling of ambient noise levels (R.T. 262:13-263:5).

Government Code § 65091(3) imposes no personal notice requirement at all when large numbers of people are affected. Thus, the owners of immediately adjoining properties who suffer drastic impacts also suffer the risk of receiving "notice" in an unsubscribed newspaper. In California such "notice" is

frequently placed in legal newspapers not read by the general public.[1/]

Government Code § 65091 thus violates the basic tenet that the right to due process is "individual." Boddie v. Connecticut, 401 U.S. 371, 380 (1971). The legislation likewise ignores the rule that the "extent to which procedural due process must be afforded . . . depends on the extent to which [the person affected] may be 'condemned to suffer a grievous loss.'" Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970).

The enforcement provisions of the California legislation further emasculate the law. Companion sections of the Government Code create a myriad of hurdles for anyone seeking

---

1/ The notice period creates an additional problem. The mailing of notice 10 days prior to the hearing may result in actual notice of a week or less. Such short notice is hardly adequate in a complex case where important property rights may be lost. The use permit applicant has had months to prepare.

to enforce their right to notice. The failure to receive a notice is not a ground for invalidating a use permit hearing. Government Code §65093.[2/] One asserting a lack of notice or a defective notice bears the burden of proving (1) substantial injury to himself or herself; (2) prejudicial error; and (3) "that a different result would have been probable if the error had not occurred." Government Code § 65010(b).[3/]

2/ Government Code § 65093 provides:

> "The failure of any person or entity to receive notice given pursuant to this title, or pursuant to the procedures established by a chartered city, shall not constitute grounds for any court to invalidate the actions of a local agency for which the notice was given."

3/ Government Code § 65010(b) provides:

> "(b) no action, inaction, or recommendation by any public agency or its legislative body or any of its administrative agencies or officials on any matter subject to this title shall be held invalid or set aside by any court on the ground of the improper admission (cont.)

Thus, in the case below, the California Court of Appeal looked past the County's misleading notice on the grounds that petitioners also had not seen it. This same logic would seem to require that, in a large project requiring only a newspaper ad, out-of-County landowners would have no rights whatsoever since they could not be expected to see an ad. Absent the requirements of due process, the possibility of post-adjudication relief might also bar all rights of enforcement.

3/ (continued)

> or rejection of evidence or by reason of any error, irregularity, informality, neglect, or omission (hereafter, error) as to any matter pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters of procedure subject to this title, unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. There shall be no presumption that error is prejudicial or that injury was done if the error is shown."

Finally, the burden of proving "a different result would have been probable" can close the door on a case before it is heard.

California's Government Code § 65091 is no substitute for due process and need not be considered by this Court. California's synthetic solution, if anything, makes all the more pressing the need to identify the fundamental individual and personal rights which lie at the heart of the Due Process Clause.

II.

THE NEED FOR JUDICIAL RELIEF IS REAL.

The Opposition brief filed by real party in interest contends that this case is moot. This is an extraordinary claim. At seven in the morning the roar of a sawmill swallows the quiet of petitioners' properties. Thirty-fold increases of noise levels are legally inflicted upon the Hayssen property until seven

at night. Noise levels in other properties have quadrupled or doubled.

Given a violation of due process and 42 U.S.C. § 1983, the right to relief cannot be questioned. "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 684 (1946).

A. Declaratory Relief.

Petitioners own properties in California and other states. They seek a clear pronouncement of the personal notice requirement.

B. Injunctive Relief.

Petitioners say that the wrong done in this case cannot necessarily be undone because, even if a revocation is granted, the County's decision-making processes may be weighted in favor of a new application now that the sawmill has been constructed.

Noise limits can still be judicially imposed. State of the art noise insulation can be required. The location of certain equipment can be moved. Hours of operation can be limited.

C. A Supplemental Pleading Is Not Required.

Monetary relief may be awarded in a Section 1983 action for equitable redress when the court is otherwise unable to grant full relief. Owen v. Independence, 560 F.2d 925 (8th Cir. 1977), vacated on other grounds, 438 U.S. 902; Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980). See also Snelson v. Ondulando, 5 Cal.App.3d 243, 259 (1970).

The right to file a supplemental complaint to state post-trial facts, upon remand, cannot be seriously questioned. See Texarkana v. Arkansas Louisiana Gas Co., 306 U.S. 188, 203 (1939). This procedure is proper in cases arising out of an injunction against a threatened harm. See, e.g., Melvin v. Stone

Co., 7 Cal.App. 324 (1908) (original complaint for injunction against threatened blasting and excavating; supplemental complaint for damages for injury to house resulting therefrom). Davis v. Stroud, 52 Cal.App.2d 308, 315 (1942). The right to plead such facts is so basic that California does not require a supplemental pleading. Thus California's leading authority states:

> "Where a suit is brought for an injunction, and a cause of action for incidental damages accrues pending the action, a supplemental complaint is proper (see infra, §1169). But the court under its general equity powers may award the incidental damages without the necessity of the supplemental pleading. (Union Oil Co. v. Reconstruction Oil Co. (1937) 20 C.A.2d 170, 183, 66 P.2d 1215; (1943) 58 C.A.2d 30, 33, 135 P.2d 621; Hutcherson v. Alexander (1968) 264 C.A.2d 126, 136, 70 C.R. 366.)" (Emphasis in original.)
> 3 Witkin, California Procedure 3d, §1166.

D. Damages.

Petitioners' ultimate right to damages cannot be questioned. Agins v. City of Tiburon, 24 Cal.3d 266 (1979), a case whose authority

is itself subject to question, is not controlling. Both the law of this Court and the law of California recognize the right to seek damages for a government imposed noise easement. See, e.g., Griggs v. Allegheny County, 369 U.S. 84 (1962); Greater Westchester Homeowners Ass'n v. City of Los Angeles, 2 Cal.3d 86, 95 (1974), cert. den. 419 U.S. 1122 (1975). This liability arises even where, as in this case, the public entity lacks the power of eminent domain. Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 866 (1985).

This case thus involves damages which extend beyond those arising from a government imposed noise easement. The County of Sonoma gave what it could not give: the rights of one citizen to another. Damages may be recovered for the breach of procedural due process which brought about this unconstitutional result. Myers v. Anderson, 238 U.S. 368 (1915); Hostrap v. Board of Junior College

Dist. No. 15, 523 F.2d 569 (7th Cir. 1975), cert. den., 425 U.S. 963; Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981), cert. den., 70 L.Ed.2d 212.

CONCLUSION

The reach of the personal notice requirement is an issue of broad importance. Petitioners respectfully request that the Writ of Certiorari be granted.

Dated: May 9, 1986.

Respectfully submitted,

JOSEPH BAXTER
Attorney for Petitioners